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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Yolo)

THE PEOPLE, Plaintiff and Respondent, v. JOSE EDUIJES MOJIA TORRES, Defendant and Appellant.	C062055 (Super. Ct. No. 08-5474)

Defendant Jose Eduijes Mojia Torres appeals from the judgment entered after a jury found him guilty of six counts of unlawful intercourse by a person over the age of 21 with a person under the age of 16 (Pen. Code, § 261.5, subd. (d))[1] and six counts of lewd and lascivious conduct with a 14 year old (§ 288, subd. (c)(1)). He received an aggregate state prison term of six years.

On appeal, defendant contends the trial court abused its discretion in refusing to grant him probation. The parties also

[1] Undesignated statutory references are to the Penal Code.

ask that we correct the abstract of judgment to reflect the fines and fees actually imposed by the trial court at sentencing, and to add the mandatory court security fee and criminal conviction assessment.

We find the court did not abuse its discretion in refusing to grant defendant probation. We shall direct the court to amend the abstract of judgment and, as amended, shall affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, 14-year-old A.G., lived with her 10-year-old sister and their mother, M.R. (mother), in an apartment in Davis. Mother worked at a nursing home from 6:30 a.m. to 3:00 p.m. during the week and often on weekends; the girls were home alone.

In or about April 2008 (all further date references are to events in 2008), mother learned from a babysitter for the girls that defendant was having a relationship with A.G. When mother confronted her, A.G. denied it.

In June, mother saw defendant getting out of a car in front of her house. That same month, she went to the apartment defendant shared with his father. At the time, A.G. lived less than half a block from defendant's apartment. Mother told defendant and his father that A.G. was 14 years old; that any involvement between defendant and A.G. was illegal in this country because he was 26 and she was 14; and that if defendant's father allowed defendant and A.G. to lock themselves

into a room in the family home to kiss or have sex that he would also be committing a crime. Mother told defendant in no uncertain terms that she did not want him to have any relationship with A.G.

Mother also told the police in June of the relationship she suspected between defendant and A.G. When the police spoke to A.G., she falsely told them she was dating defendant's teenaged brother.

In July or August, A.G.'s family moved to a different apartment elsewhere in Davis.

In October, mother saw defendant getting out of a car at her home.

Mother returned home unannounced around 9:00 a.m. one weekend morning in October 2008. When she opened the front door into her living room, she saw A.G., who was naked, run into the closet. Defendant, also naked, struggled to put on his underwear; he also ran into the bedroom closet. Mother saw defendant's erect penis. While defendant was in the closet, mother called the police.

Defendant was arrested. After he was given *Miranda*[2] admonitions, defendant told the officer A.G. was his girlfriend and that she was 14 years old. Defendant was charged with eight counts of unlawful intercourse with a person under 16 by a person older than 21 (§ 261.5, subd. (d)), and eight counts of

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[2] *Miranda v. Arizona* (1966) 384 U.S. 436 [16 L.Ed.2d 694].)

committing lewd and lascivious acts upon a child of 14 or 15 years (§ 288, subd. (c)(1)).

At trial, A.G. testified that, on the morning they were interrupted by her mother, she had been having sex with defendant while her sister slept.

A.G. also testified she met defendant in April 2008, when she was in the eighth grade. A.G. told defendant she was 14. Within two weeks, he became her boyfriend and they began having intercourse nearly every day. At first, they had sex at his apartment; after A.G. moved in August, defendant knew to come over to her house on weekends while mother worked, or A.G. would ask him to come over, and they would have sex.

Defendant's cousin's wife Ana testified on his behalf at trial. Ana told jurors she and her husband were among those sharing the apartment with defendant. Ana recalled A.G. coming to the apartment, but she did not know how often, and did not know whether defendant and A.G. ever had sex.

The jury found defendant guilty of six counts of committing lewd and lascivious acts, and six counts of unlawful sexual intercourse. It acquitted him of the remaining counts.

In advance of sentencing, the probation department prepared a report recommending that defendant be denied probation and sentenced to prison for the midterm of three years because, although he is statutorily eligible for probation, the totality of the circumstances indicate he is not a suitable candidate:

"[I]t is important to keep in mind that the victim in this matter turned 14 only two months before her first encounter with the defendant. Had she not [] just turned 14, the defendant would be ineligible for probation pursuant to Penal Code section 120.066[, subdivision] (8). Further, a grant of probation could not be offered until a psychological evaluation was completed pursuant to Penal Code section 288.1. Finally, there is no way for the defendant to justify his continuous actions. He knew the [victim] was 14 years of age, and continued to involve her in this sexual relationship, even after being warned against such by her mother." The probation report also noted that defendant scored a 1 on the Static-99 measure of risk for sexual offense recidivism, on a 0 to 10+ scale.

At sentencing, defense counsel argued defendant should receive probation because he has no prior offenses, has a large family network of support, and because "there are also social cultural issues . . . that [defendant] did not fully understand at the time, but does now."

Five witnesses offered statements of mitigation on defendant's behalf. Defendant's father testified he suffers from health problems and needs defendant with him; defendant does not drink or abuse drugs and is a hard worker; and this "will not happen again because he has been warned for this not to happen." Defendant's brothers testified defendant is generally "well behaved." One childhood friend testified defendant never got into trouble growing up in El Salvador, and

another testified defendant "is a good person and this is bad luck that has happened."

Speaking on his own behalf, defendant said: "First of all I would like to say that I'm very sorry for what I did. Above all because of the damage that it's done to my family. [¶] And I'd also ask for the lady to forgive me for the lack of respect that I showed to her. The other thing I would like to ask Your Honor is that if you want to send me to prison, I would ask you to deport me, and not send me to prison. [¶] Because I'm really sorry for what happened. This has never happened to me before, anything like this, and it will never happen again. That's all."

The court found defendant unsuitable for probation, for the following reasons: "We have a lengthy period of criminal conduct regarding whether this child was more vulnerable than other victims of similar crime[s]. [¶] There is[,] contrary to the probation office's analysis, there is a heightened vulnerability. She was home without a parent around all day long, because her mother was a single mother and is out working and leaves a child home, that puts the child in a more vulnerable position. [¶] The other factors that are listed here do suggest just what the probation office has analyzed it as. However, the expression of remorse here, while the probation office says he did express remorse, it is primarily because he has caused so many problems for himself and his own family and he apologized for showing disrespect to the victim's

mother. [¶] The point here is that he had sex with a child and there has been no suggestion ever that anyone, he or any member of his family has recognized that this is a problem, but in California having sex with children is a crime."[3]

DISCUSSION

I. The Court Did Not Abuse Its Discretion in Refusing Probation

Defendant contends the trial court abused its discretion by denying him probation, because it relied upon aggravating factors that were not supported by the record, and gave inadequate weight to mitigating and other relevant factors.

"'All defendants are eligible for probation, in the discretion of the sentencing court [citation], unless a statute provides otherwise.' [Citation.] 'The grant or denial of probation is within the trial court's discretion and the defendant bears a heavy burden when attempting to show an abuse of that discretion. [Citation.]' [Citation.] 'In reviewing [a trial court's determination whether to grant or deny probation,] it is not our function to substitute our judgment for that of the trial court. Our function is to determine whether the trial court's order granting [or denying] probation is arbitrary or

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[3] The court sentenced defendant to the midterm of three years on count 1, the first unlawful intercourse count; on three of the remaining five unlawful intercourse counts, defendant received one-third the midterm (one year) to be served consecutively, for a total aggregate sentence of six years. On the two remaining unlawful intercourse counts, he received one-third the midterm, to be served concurrently, and sentence on each of the six lewd and lascivious conduct convictions was stayed pursuant to section 654.

capricious or exceeds the bounds of reason considering all the facts and circumstances.'" (*People v. Weaver* (2007) 149 Cal.App.4th 1301, 1311, quoting *People v. Superior Court (Du*) (1992) 5 Cal.App.4th 822, 825; see also *People v. Read* (1990) 221 Cal.App.3d 685, 689 ["Probation is an act of clemency that is granted only in the discretion of the judge."].)

"The decision to grant or deny probation requires consideration of all the facts and circumstances of the case." (*People v. Birmingham* (1990) 217 Cal.App.3d 180, 185.) The California Rules of Court[4] set forth the policies and criteria that should guide the trial court's grant or denial of probation. Rule 4.410 provides:

"(a) General objectives of sentencing include:

"(1) Protecting society;

"(2) Punishing the defendant;

"(3) Encouraging the defendant to lead a law-abiding life in the future and deterring him or her from future offenses;

"(4) Deterring others from criminal conduct by demonstrating its consequences;

"(5) Preventing the defendant from committing new crimes by isolating him or her for the period of incarceration;

"(6) Securing restitution for the victims of crime; and

"(7) Achieving uniformity in sentencing.

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[4] Further references to rules are to the California Rules of Court.

"(b) Because in some instances these objectives may suggest inconsistent dispositions, the sentencing judge must consider which objectives are of primary importance in the particular case. The sentencing judge should be guided by statutory statements of policy, the criteria in these rules, and the facts and circumstances of the case."

Regarding a trial court's decision whether to grant or deny probation, rule 4.414 provides (as relevant to the issues raised by defendant's appeal):

"Criteria affecting the decision to grant or deny probation include facts relating to the crime and facts relating to the defendant.

"(a) Facts relating to the crime--

"Facts relating to the crime include:

"(1) The nature, seriousness, and circumstances of the crime as compared to other instances of the same crime; [¶] . . . [¶]

"(3) The vulnerability of the victim; [¶] . . . [¶]

"(6) Whether the defendant was an active or a passive participant; [¶] . . . [¶]

"(8) Whether the manner in which the crime was carried out demonstrated criminal sophistication . . . ; and

"(9) Whether the defendant took advantage of a position of trust or confidence to commit the crime.

"(b) Facts relating to the defendant--

"Facts relating to the defendant include:

"(1) Prior record of criminal conduct . . . ;

[¶] . . . [¶]

"(3) Willingness to comply with the terms of probation;

[¶] . . . [¶] [and]

"(7) Whether the defendant is remorseful . . . ."

In deciding whether to grant or deny probation, a trial court may also consider additional criteria not listed in the rules provided those criteria are reasonably related to that decision. (Rule 4.408(a).) A trial court is required to state its reasons for denying probation and imposing a prison sentence, including any additional reasons considered pursuant to rule 4.408. (Rules 4.406(b)(2) & 4.408(a).) Unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. (Rule 4.409.)

"'The circumstances utilized by the trial court to support its sentencing choice need only be established by a preponderance of the evidence. [Citations.]' [Citation.] Accordingly, in determining whether a trial court abused its discretion by denying probation, we consider, in part, whether there is sufficient, or substantial, evidence to support the court's finding that a particular factor was applicable." (*People v. Weaver*, *supra*, 149 Cal.App.4th at p. 1313.) However, a trial court does not abuse its discretion unless its decision is so irrational or arbitrary that no reasonable person could

agree with it, and this court is neither authorized nor warranted in substituting our judgment for that of the trial judge. (*People v. Carmony* (2004) 33 Cal.4th 367, 376-377.)

Defendant argues the trial court erred in "failing to give sufficient weight to [his] lack of [a] criminal record [rule 4.414(b)(1)], his lack of criminal sophistication [rule 4.414(a)(8)], the fact that he was engaged in a romantic relationship with [A.G.], and the fact that in virtually every respect [he] was an excellent candidate for probation. The trial court further abused its discretion by relying on a probation report that wrongly characterized [defendant] as abusing a position of trust [rule 4.414(a)(9)] and by finding [A.G.] was unusually vulnerable because her mother worked [rule 4.414(a)(3)]."

He also contends the court erred in finding that the offenses, viewed together, were more serious than other instances of the crime (rule 4.414(a)(1)), and that defendant did not express remorse (rule 4.414(b)(7)).

We find no error. First, defendant's claim that the trial court failed to properly assess whether he was an "excellent candidate for probation" is not supported by the record. Unless the record affirmatively shows otherwise, a trial court is deemed to have considered all relevant criteria in deciding whether to grant or deny probation or in making any other discretionary sentencing choice. (Rule 4.409.) Here, the record indicates the trial court considered all of the relevant

facts bearing on both the crimes and defendant: The court considered the probation report--although it disagreed with the reporting officer that the victim was "no more vulnerable than other victims of similar crimes," and that defendant had expressed remorse--the arguments of counsel, and testimony of witnesses. The court gave a well-reasoned and considered explanation for its decision to deny probation.

Second, we reject defendant's assertion that the court had no proper basis for its conclusion that A.G. was a vulnerable victim. As defendant acknowledges, "'Vulnerability means defenseless, unguarded, unprotected, accessible, assailable, one who is susceptible to the defendant's criminal act.'" (Quoting *People v. Smith* (1979) 94 Cal.App.3d 433, 436.) The evidence adduced at trial supports the trial court's conclusion that while her mother worked, A.G. was unguarded and unprotected from defendant's attentions. Both A.G. and defendant knew that, had A.G.'s mother been present, she would not have allowed the two of them to spend any time in each other's company. It was only because her mother left early in the morning for work most days that defendant had access to A.G. for almost daily intercourse. A.G. testified defendant knew he could come over to her house on weekends for sex because her mother worked most weekends. Under the circumstances, the trial court did not err in relying on the vulnerability factor.

We also find no error in the court's agreement with the probation officer that the "lengthy period of criminal conduct"

rendered the offenses more serious than other similar crimes, when viewed together in their totality. For example, although he was convicted of six discrete acts of unlawful sexual intercourse, the evidence established defendant had sex almost daily with an underage girl for months. He continued to do so for several months *after* her mother confronted him, demanded that he stop, and informed him his actions had serious legal consequences. The court did not err in concluding that his continued crimes, committed virtually every day that A.G.'s mother was at work, rendered the offenses more serious than other similar crimes committed as isolated incidents. That he did not use force, coercion or trickery in any particular instance is immaterial.

Nor do we find the court abused its discretion in concluding that defendant failed to express real remorse for his actions, within the meaning of rule 4.414(b)(7). The court fairly concluded defendant failed to express any true remorse for his acts toward A.G., and that his expression of regret was "primarily because he has caused so many problems for himself and his own family" and because he "show[ed] disrespect to the victim's mother." On appeal, defendant emphasizes his statement in the presentence report that "[h]e regrets what he has done. He knows it was a mistake"; even this statement contains no real acknowledgment that his actions toward A.G. were wrong.

To the extent the trial court also may have relied on the probation department's finding that defendant should be denied

probation because he abused a position of trust, that was error; there was no position of trust. But defendant has not shown it is reasonably probable the court would have granted him probation had it not so erred. (*People v. Price* (1991) 1 Cal.4th 324, 492 ["When a trial court has given both proper and improper reasons for a sentence choice, a reviewing court will set aside the sentence only if it is reasonably probable that the trial court would have chosen a lesser sentence had it known that some of its reasons were improper."].) Any error the trial court may have made in denying probation was harmless.

Defendant complains the trial court gave short shrift to various factors he claims favored a grant of probation, such as his lack of a prior criminal record or that he imagined himself in a "romantic relationship" with A.G. But "the trial court need not articulate its reasons for rejecting factors which would support the grant of probation." (*People v. Kronemyer* (1987) 189 Cal.App.3d 314, 366.)

In sum, we conclude no abuse of discretion occurred here. The court considered all of the factors bearing on the decision whether to grant or deny defendant probation and (with one exception) it has given reasons for denying probation which were supported by sufficient evidence. We cannot say, as a matter of law, that the court should have found that factors favorable to a grant of probation outweighed these factors, or that the court's conclusion exceeds the bounds of reason.

II. The Court's Imposition of Fees Contained Errors in the Abstract of Judgment

The parties agree the court made an error in its imposition of fees at sentencing, and likewise concur that the error was corrected by the abstract of judgment. We agree. The court's oral pronouncement of judgment prevails over contrary statements in the abstract of judgment. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1183.)

At sentencing, the court imposed a $50 fee pursuant to "Section 11372.5" and accompanying penalty assessment of $840. It also imposed a $150 fee pursuant to section "11372.7" and an accompanying penalty assessment of $420. Defendant contends, and the People concede, that these fees--apparently imposed under Health and Safety Code sections 11372.5 and 11372.7--are not applicable to this case because defendant was not convicted of any offense to which these sections apply. Neither fee nor its accompanying assessment appears on the abstract of judgment.

The People also point out that the court neglected at sentencing to impose the court security fee of $20 per conviction required by Penal Code section 1465.8 or the criminal conviction assessment of $30 per conviction required by Government Code section 70373. (See *People v. Castillo* (2010) 182 Cal.App.4th 1410, 1415; *People v. Brooks* (2009) 175 Cal.App.4th Supp. 1, 5-7; *People v. Crittle* (2007) 154 Cal.App.4th 368, 370.) These errors were also corrected in the abstract of judgment, which properly reflects a total court security fee of $240 and a total criminal conviction assessment

of $360. Defendant makes no challenge to the People's argument in his reply brief.

Neither of these errors require amendment of the abstract of judgment.[5]

DISPOSITION

The judgment is modified to delete the imposition of the $50 laboratory analysis fee and assessment (Health & Saf. Code, § 11372.5) and the $150 drug program fee and assessment (Health & Saf. Code, § 11372.7). The judgment is further modified to include imposition of the court security fee of $20 per conviction (Pen. Code, § 1465.8), a total of $240 for defendant's 12 convictions, and the criminal conviction assessment of $30 per conviction (Gov. Code, § 70373), a total of $360. These modifications are reflected already in the abstract of judgment. As modified, we affirm the judgment.

BUTZ, J.

We concur:

SIMS, Acting P. J.

ROBIE, J.

[5] Pursuant to miscellaneous order No. 2010-002, we have considered whether defendant is entitled to additional presentence custody credits under recent amendments to section 4019. (See Stats. 2009, 3d Ex. Sess., ch. 28, § 50.) Because defendant is required to register under section 290 due to his convictions for violating section 288, subdivision (c)(1) (§ 290, subd. (c)), we conclude he is not entitled to additional conduct credit. (§ 4019, subd. (b)(2).)